Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW J. RYAN, ROBERT C. JUBELIRER, JESS M. STAIRS and JAMES J. RHOADES,

Petitioners,

vs.

DAVID POWELL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DICK THORNBURGH
JOHN P. KRILL, JR. *(Counsel of Record)*
LINDA J. SHOREY
DAVID R. FINE

KIRKPATRICK & LOCKHART LLP
240 NORTH THIRD STREET
HARRISBURG, PA 17101
(717) 231-4500
Counsel for Petitioners

SEPTEMBER 24, 1999

QUESTIONS PRESENTED

1. Whether a federal agency's regulation prohibiting unintentional disparate impacts as to race or ethnicity in state programs receiving federal funds exceeds the statutory authority of the agency, which is limited to promulgating regulations that "effectuate the provisions of" Section 601 of Title VI of the Civil Rights Act of 1964, which prohibits only intentional discrimination.

2 Whether Congress intended to allow plaintiffs to bypass federal agencies and to bring private actions to enforce disparate-impact regulations promulgated under Section 602 of Title VI of the Civil Rights Act of 1964.

3. Whether an alleged injury to plaintiffs is traceable or redressable for purposes of standing under Article III of the Constitution, where plaintiffs complain about unequal state subsidies to local school districts, but where the plaintiffs' own school district can offset any increase in the state subsidy by a reduction in its own share of spending.

LIST OF PARTIES

Petitioners are officers of the General Assembly of the Commonwealth of Pennsylvania: Matthew J. Ryan, Speaker of the House of Representatives; Robert C. Jubelirer, President *pro tempore* of the Senate; Jess M. Stairs, Chairman of the House Education Committee; and James J. Rhoades, Chairman of the Senate Education Committee (the "Legislative Parties"). The Rep. Stairs and Sen. Rhoades are also *ex officio* members of the State Board of Education. Petitioners intervened in district court in support of the defendants and were appellees in the Third Circuit. Respondents who were defendants in district court and appellees in the court of appeals are executive-branch officers of the Commonwealth: Thomas J. Ridge, Governor; James P. Gallagher, Chairman of the State Board of Education); Eugene W. Hickok, Secretary of Education; Barbara Hafer, Treasurer (the "Executive Parties"). Respondents who were plaintiffs in district court and appellants in the court of appeals include the following: the City of Philadelphia and its Mayor, Edward G. Rendell; the School District of Philadelphia, its Superintendent, David W. Hornbeck, its Board of Education and the President of the Board, Floyd W. Alston; David Powell; Shelean Parks; Patrice Everage; Julia A. Davis; Yvette Bland; Geraldine Newton; Maria M. Rivera; Mary E. Miller; Gregory Luzak; Catherine Luzak; Fu Zhen Xie; The Black Clergy of Philadelphia and Vicinity; Philadelphia Branch NAACP; ASPIRA, Inc., of Pennsylvania; Parents Union for Public Schools; Citizens Committee On Public Education In Philadelphia; Parents United for Better Schools, Inc., Respondent, the Philadelphia Federation of Teachers, intervened as a plaintiff in district court and was an appellee in the court of appeals.

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Petitioners respectfully request that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Third Circuit in *Powell* v *Ridge*, 98-2096 (Appendix A at 1a), is not yet published in the Federal Reporter 3d but is reported online at 1999 U.S. App. LEXIS 20092 and 1999 WL 643364. The decision of the U.S. District Court for the Eastern District of Pennsylvania in *Powell* v *Ridge*, No. 98-1223 is not reported (Appendix B at 35a).

JURISDICTION

This petition is filed within 90 days after the court of appeals entered its judgment on August 25, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1). The constitutionality of a statute is not at issue.

STATUTORY PROVISIONS INVOLVED

The federal statutory and regulatory provisions involved include the following: Sections 602 and 603 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d and 2000d-1, 34 C.F.R. § 100.3, 34 C.F.R. § 100.7 and 24 PA. STAT. ANN. § 2502.35 (Appendices C, D, E, F and G at 65a, 66a, 68a, 73a and 75a). The state and local expenditures at issue are established by state statute or local ordinance.

STATEMENT OF THE CASE

A. Factual Background

Philadelphia's School District is the largest of the 501 public school districts in the Commonwealth of Pennsylvania, with 12 per cent of all public school students in the Commonwealth.[1] The School District has three principal sources of revenue: local taxes, subsidies from the Commonwealth and federal grants.[2] The School District obtains approximately half of its overall operating budget from local tax revenues. The remainder of its revenue consists of Commonwealth subsidies and federal grants.[3]

The Commonwealth's basic education subsidy for its public schools is determined through a statutory formula established by the Pennsylvania General Assembly.[4] For the 1997-1998 school year, the state subsidy for each school district was the amount received for the previous

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[1] The facts in this petition are taken from the complaint and from legislative enactments, such as state and local appropriations and budget measures. They have not been included in the appendix, because of their length.

[2] Public school funding mechanisms in Pennsylvania are established by statute. The funding mechanisms are also described generally in state-court decisions. *See, e.g., Danson* v *Casey*, 399 A.2d 360 (Pa. 1979).

[3] *See 1997/1998 Budget Reports of Revenue and Expenditure Data for the Philadelphia School District* (submitted to the Pennsylvania Department of Education on September 11, 1997) (showing estimated revenue for the 1997-98 school year of $1,521,725,429, only $606,209,000 of which came from the Commonwealth).

[4] 24 PA. STAT. ANN. § 25-2502.35 (reprinted in Appendix G).

year plus a "base supplement" that considered a school district's taxable real property and personal income, a "growth supplement" and a "poverty supplement" determined by the number of children in low-income families residing in the district.[5] The formula results in school districts receiving varying levels of state subsidy per student, rather than a flat amount per district or per student.[6] However, the formula is facially neutral with regard to race and ethnicity.

Philadelphia, like every school district, is not obligated to match the state subsidy with local spending. Philadelphia may increase or lower its own spending on public schools without regard to the state subsidy. If it were to receive an increase in its state subsidy, Philadelphia would have the discretion to lower its own spending on its public schools by an equal amount or more.

Plaintiffs alleged two causes of action. The first count was based on a regulation promulgated by the federal Department of Education under Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1. The regulation prohibits a recipient of federal funds from administering a program in a manner that has a disparate impact on a racial or ethnic basis, even if the impact is inadvertent.[7] The regulation does not state any grounds

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[5] The state appropriation to school districts for basic education in FY 1998-1999 was $3.5 billion. General Appropriation Act of 1998, Act No. 1998-6A.

[6] Philadelphia, for example, has 12 per cent of the Commonwealth's public school children yet receives about 18 per cent of the total state subsidy for basic education. *Supra* note 3. If the subsidy were given on a flat, per-student basis, Philadelphia would obviously get less.

[7] Appendix E at 69a.

upon which such disparate impact may be excused or justified. The second count alleged a violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983, based on the purported violation of the regulation.

Plaintiffs alleged that the total funding of the Philadelphia School District, from all sources, was substantially less per student than in some suburban school districts. Because a majority of Philadelphia's public school children are non-white and a majority of the students in the suburban districts are white, the complaint alleged that there was an actionable disparate impact under the agency regulation. Additionally, the complaint alleged that, among an unspecified number of school districts around the state with comparable levels of student poverty, those with large non-white student bodies received less Commonwealth subsidy per student than those with largely white student bodies.

Although the complaint selectively used statistics, the complaint did not compare Philadelphia with all school districts in the state, either as to per-student state subsidies or as to total per-student revenue from all sources. The complaint also did not compare Philadelphia with other school districts that have not just a similar level of student poverty but also a similar level of locally-taxable real property and personal income.

B. Proceedings Below

The action commenced on March 9, 1998, in the United States District Court for the Eastern District of Pennsylvania. Both the Executive Parties and the intervening Legislative Parties filed dispositive motions under FED. R. CIV P. 12.

Shortly thereafter, this Court summarily disposed of *Seif* v *Chester Residents Concerned for Quality Living*, No. 97-1620, vacating the judgment of the Third Circuit on a suggestion of mootness. 119 S.Ct. 22 (1998). In *Chester Residents*, the Third Circuit had found an implied private right of action to enforce disparate-impact regulations promulgated by federal agencies under Section 602 of Title VI, 42 U.S.C. § 2000d-1. 132 F.3d 925 (CA3 1997).

The defendants in this case filed supplemental motions in the district court raising the same issue as in *Chester Residents*.

The district court found the Third Circuit's vacated holding in *Chester Residents* persuasive and held that Title VI regulations could give rise to private actions. (Appendix B at 61a-62a). However, the district court held that the complaint failed to state a claim of disparate impact and that the complaint failed to state a claim under Section 1983 because none of the defendants were "persons" for purposes of that statute. (Appendix B at 44a-45a).

Plaintiffs appealed to the Third Circuit, which reversed the district court and refused to affirm on alternate grounds urged by the appellees. (Appendix A at 1a). It held that the disparate-impact regulations were valid, that there was an implied private right of action, that all plaintiffs had standing and that the complaint stated a claim. It also held that an action under Section 1983 could be maintained for violation of the regulation.

REASONS FOR GRANTING THE PETITION

I. WHETHER A REGULATION MAY PROHIBIT UNINTENTIONAL DISPARATE IMPACTS WHEN THE UNDERLYING STATUTE PROHIBITS ONLY INTENTIONAL DISCRIMINATION IS AN IMPORTANT ISSUE AND THE THIRD CIRCUIT'S CONCLUSION IS INCONSISTENT WITH RECENT AUTHORITY OF THIS COURT.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et al.*, prohibits only *intentional* racial or ethnic discrimination by recipients of federal funding. *University of California Regents* v *Bakke*, 438 U.S. 265 (1978); *Guardians Association.* v *Civil Service Commission of New York City*, 463 U.S. 582, 607-08 (1983) (opinion of Powell, J., in which Burger, C. J., and Rehnquist, J., joined); 463 U.S. at 612 (opinion of O'Connor, J.); 463 U.S. at 634 (opinion of Stevens, J., in which Brennan and Blackmun, JJ., joined). Section 602 of Title VI authorizes regulations "to effectuate the provisions" of Section 601.

Regulations must be within the scope of the statutory delegation to the agency. In *Central Bank of Denver, N.A.* v *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), for example, the Court held that a private plaintiff could not bring a claim under Rule 10b-5, 17 C.F.R. § 240.10b-5, for conduct that would not be prohibited by the enabling statute, Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j. 511 U.S. at 173.[8] In *Ernst & Ernst* v *Hochfelder*, 425 U.S. 185

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[8] A part of the holding in *Central Bank* that is not material here was superseded by statute. *See* Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995).

(1976), the Court held that, because the enabling statute required proof of scienter to impose liability, a regulation could not permissibly impose liability based only on proof of negligence.

Yet despite *Bakke*, *Guardians* and the scope of Title VI, more than 40 federal agencies have promulgated regulations – purportedly under the authority of Title VI – that prohibit unintentional disparate impacts on racial or ethnic groups. See *Alexander* v *Choate*, 469 U.S. 287, 294 (1985). Those regulations affect virtually every part of our society. *See, e.g., Powell* (education funding); *Chester Residents*, 132 F.3d 925 (environmental permitting); *New York Urban League* v *New York*, 71 F.3d 1031 (CA2 1995) (mass-transit fares); *Ferguson* v *Charleston*, No. No. 97-2512, 1999 U.S. App. LEXIS 15611 (CA4 July 13, 1999) (drug testing); *Villanueva* v *Carere*, 85 F.3d 481 (CA10 1996) (transfer of students to charter school); *City of Chicago* v *Lindley*, 66 F.3d 819 (CA7 1995) (health care for the elderly); *David K.* v *Lane*, 839 F.2d 1265 (CA7 1988) (prison rules); *Larry P.* v *Riles*, 793 F.2d 969 (CA9 1984) (IQ testing); *Sandoval* v *Hagan*, 7 F.Supp.2d 1234 (M.D. Ala. 1998) (driver licensing); and *Bryant* v *New Jersey Dep't. of Transportation*, No. 97-1397, 1998 U.S. Dist. LEXIS 1847 (D.N.J. Feb. 17, 1998) (highway siting).

In *Guardians*, the Court touched on, but did not resolve, the question of whether Title VI disparate-impact regulations are valid given that the underlying statute bars only intentional discrimination. Justice O'Connor wrote in her concurrence that

> [i]f, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe only purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory effect. Such regulations do not simply "further" the purpose of Title VI; they go well beyond that purpose.

463 U.S. at 613 (O'Connor, J., concurring). The importance of Justice O'Connor's concern is highlighted by the fact that, since *Guardians,* plaintiffs have often made disparate-impact claims under Title VI regulations that they could not have made under the statute itself, a fact made plain by the list of cases on the preceding page.

The Third Circuit misinterpreted *Guardians* to hold that such disparate-impact regulations are valid. (Appendix A at 22a). While it is true that five Justices suggested in *Guardians* that such regulations could be valid, there was no *holding* to that effect. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....'" *Marks* v *United States,* 430 U.S. 188, 193 (1977) (citation omitted). Of the five Justices in *Guardians* who opined that Title VI regulations could prohibit disparate impacts, four were in dissent (Marshall, Stevens, Brennan and Blackmun, JJ). Contrary to the Third Circuit's contention in this case, *Guardians* did not hold

that disparate-impact regulations are valid and, in fact, this Court has never reached that conclusion.[9]

There is only one decision by this Court that could be read to ratify disparate-impact claims under Title VI: *Lau* v *Nichols,* 414 U.S. 563 (1974). However, as several concurring Justices noted in *Guardians,* to the extent *Lau* included such a holding, it was implicitly overruled by *Bakke*. *See Guardians,* 463 U.S. at 611 n.4 (opinion of Powell, J., concurring in the judgment and joined by Burger, C.J., and Rehnquist, J.) and 463 U.S. at 615 (opinion of O'Connor, J., concurring in the judgment).[10]

This case presents the Court with an opportunity to make explicit what *Bakke* made implicit: *Lau* is no longer good law. Moreover, the Court has never passed on the validity of any of the more than three dozen disparate-impact regulations promulgated under the authority of Title VI. Because these regulations are increasingly the bases for private actions in the federal courts, the Court should take

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[9] Part of the confusion arises from dictum in Justice Marshall's opinion in *Alexander* v *Choate*, 469 U.S. 287, 293 (1985), in which he wrote that *Guardians* "held" that the regulations could prohibit disparate impacts. In the context of *Alexander*, his statement was dictum. Moreover, it was a mistaken characterization of another case, rather than a holding or dictum arising from *Alexander* itself.

[10] In *Lau,* Justice Douglas used regulations as a guide to conclude that a disparate impact could violate Title VI itself. 414 U.S. at 566 ("We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, to reverse the Court of Appeals."). *Bakke*'s holding that the statute only reaches intentional discrimination undercut the basis for the *Lau* decision.

this occasion to resolve that which has generated so much confusion in the 16 years since it decided *Guardians*.[11]

II. THE COURT SHOULD DECIDE WHETHER PLAINTIFFS CAN BYPASS THE FEDERAL AGENCY THAT OVERSEES A SPENDING PROGRAM AND ASSERT A PRIVATE CAUSE OF ACTION UNDER "DISPARATE-IMPACT" REGULATIONS.

A. It is a question of national importance that affects innumerable federal, state and local programs.

This case presents the same question on which the Court issued a writ of *certiorari* to the Third Circuit in *Seif* v *Chester Residents Concerned for Quality Living*, 118 S.Ct. 2296 (1998). On August 17, 1998, the Court acted on a suggestion of mootness and dismissed that case. 119 S.Ct. 22 (1998). The petition in *Chester Residents* framed the issue as follows:

> Did Congress intend to create a private cause of action in federal court that bypasses a federal agency's review and enforcement process under Section 602 of Title VI of the Civil Rights Act of 1964, simply by alleging a discriminatory effect in the administration of programs and activities of a federally-funded State or local agency?

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[11] In the years since *Guardians*, plaintiffs have filed dozens of private actions in the federal courts based on Title VI disparate-impact regulations. Some of the more prominent cases are listed on Page 7, *supra*.

This case presents both the same issue and the same result in the court of appeals as in *Chester Residents*. All of the reasons underlying the Court's decision to accept review in that case apply with equal force in this case.

The preceding section of this petition describes the broad spectrum of areas affected by Title VI disparate-impact regulations, from education to the environment to highway siting to drug testing to drivers' licensing. However, this Court has yet to pass on the validity of those regulations or whether they may give rise to private actions.

The Court decided to provide guidance in *Chester Residents* but was unable to do so. When the question arises in environmental and other regulatory siting programs, it will often escape review, because the applicant, when faced with expensive delay, may be able to withdraw the project from consideration and go to another locality. This case presents no such threat of mootness, a fact made plain by the lengthy litigation in Pennsylvania state courts regarding funding for the Philadelphia schools. *See, e.g., Danson* v *Casey*, 399 A.2d 360 (Pa. 1979). The Court should settle this significant legal issue.[12]

This case also has national importance in another dimension. If plaintiffs can bring suits such as this, the

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[12] This case and *Chester Residents* present the only circuit-court cases to analyze the issue of whether to imply a private action under Title VI regulations. The remaining cases seem to assume, without deciding, that there is a private right of action. *See, e.g., Castenada by Castenada* v *Pickard*, 781 F.2d 456 (CA5 1986); *Buchanan* v *City of Bolivar, Tenn.*, 99 F.3d 1352 (CA6 1996); *David K.*, 839 F.2d 1265; *Larry P.*, 793 F.2d 969; and *Georgia State Conference of Branches of NAACP v Georgia*, 775 F.2d 1403 (CA11 1985).

States will be unable to subsidize public education, or to spend for other social welfare purposes, on anything other than a flat per-person basis without being besieged by litigation in the federal courts.

Like Pennsylvania, most States use multi-part formulas to determine how much funding to distribute to school districts. *See, e.g., Serrano* v *Priest,* 557 P.2d 929, 933 (Ca. 1977) (California); *Committee for Educational Rights* v *Edgar,* 672 N.E.2d 1178, 1180-81 (Ill. 1996) (Illinois); *Bismarck Public School District #1* v *North Dakota,* 511 N.W.2d 247, 252 (N.D. 1994) (North Dakota); and *Brigham* v *Vermont,* 692 A.2d 384, 387 (Vt. 1997) (Vermont). Yet any formula that provides funding on other than a strictly per-student basis is likely to have a statistical "disparate impact" for or against some racial or ethnic group in any State that is not completely homogeneous.

For example, to the extent Pennsylvania's formula considers local taxing potential, the affluent, and largely white, suburban districts must get less per-student from the Commonwealth than Philadelphia. Under the precedent established by the Third Circuit, those suburban districts would have an actionable claim of "disparate impact," because the regulations do not apply only to minorities. They apply to everyone – since we all have a race, color or national origin – who could show a statistical disparity on that basis. The Commonwealth would find itself frustrated in attempting to consider disparate needs that range from those of small rural school districts in its poor Appalachian counties to those of its large urban school districts, which can combine high-value taxable commercial realty and high personal income with inner-city poverty. If the Third Circuit's decision stands, the Commonwealth faces potentially 500 more federal lawsuits filed by school

districts *other* than Philadelphia. Other States will be similarly affected.

The agency regulation at issue in this case provides no guidance as to how to resolve the tension between its facial, blanket prohibition on disparate impact and the many disparate needs that the States must consider in structuring their programs. This might not in itself be a problem as long as the agency were the only party with standing to question the conduct of the recipients of its funding. The agency could examine the circumstances of any important case, articulate its policy considerations and exercise its discretion to seek changes in the way its money is spent or to cancel the funding entirely.

The precedent established by the Third Circuit invites myriad private suits, which the courts will have to decide without agency expertise to guide their deliberations. Not surprisingly, the Third Circuit's decision in *Chester Residents* was regarded by many as a call to litigation.[13] With the *vacatur* of *Chester Residents*, this case is now the only circuit case to explicitly hold that private plaintiffs may enforce Section 602 disparate-impact regulations.

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[13] *See, e.g.*, Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1 (1999); Jimmy White, *Environmental Justice: Is Disparate Impact Enough?*, 50 MERCER L. REV. 1155 (1999); Amanda C.L. Vig, *Using Title VI to Salvage Civil Rights from Waste:* Chester Residents Concerned for Quality Living v. Seif, *132 F.3d 925*, 67 U. CIN. L. REV. 907 (1999); and R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 AM. U. L. REV. 229 (1998).

Accordingly, this case is likely to take *Chester Residents*' place as the foundation for such private actions nationwide. The outcomes in those cases are quite likely to be at variance with what the agencies would do if they exercised their primary jurisdiction. Because the regulation applies to disparate impacts on all races and ethnic groups, not just to impacts on members of minority groups, the Third Circuit's approach is more likely to harm members of minority groups than it is to help them in education and social welfare programs.

B. Courts of appeals have used different tests to find an implied private right of action in agency regulations.

The Court has not yet provided a mode of analysis for determining when to find an implied private right of action to enforce a regulation.[14] Without that guidance, the courts of appeals have adopted a variety of tests that consider materially different factors.

In this case, the Third Circuit used the test it developed in *Angelastro* v *Prudential-Bache Securities*, 764 F.2d 939 (CA3 1985), for determining whether to infer the existence of a private right of action to enforce a regulation. (Appendix A at 16a). The elements of the *Angelastro* test are: (1) whether the statute under which the regulation was promulgated could itself engender a private action; (2) whether the agency rule is properly within the scope of the enabling statute; and (3) whether implying a

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[14] *See* Gilbert Paul Carrasco, *Public Wrongs, Private Rights: Private Attorneys General for Civil Rights*, 9 VILL. ENVTL. L.J. 321, 323 n.10 (1998) ("To date, the Supreme Court has not articulated a specific test.").

private right of action will further the purposes of the enabling statute.

The Second Circuit has also adopted a three-pronged test developed by one of its district courts, but the prongs are materially different than those in the Third Circuit's test. *Drake* v *Delta Air Lines, Inc.*, 147 F.3d 169 (CA2 1998), looked at (1) whether the enabling statute was silent with respect to the existence of a private right of action to enforce the regulations; (2) whether there was an administrative enforcement mechanism in place to address alleged violations of the regulations; and (3) whether rights were created in the statute for a specific class of persons.[15]

The Ninth Circuit has a two-part test for determining whether regulations give rise to a private right of action: (1) whether Congress delegated authority to establish rules implying a private right of action; and (2) whether the rule in question was drafted such that a private right of action is legitimately implied. *See Robertson* v *Dean Witter Reynolds*, 749 F.2d 530, 536 (CA9 1984).

The Fifth Circuit has merely used the four-part test of *Cort* v *Ash*, 422 U.S. 66 (1975). Its decision in *Lowrey* v *Texas A&M University System*, 117 F.3d 242 (CA5 1997), assumes that the factors for inferring a private right of action in a regulation are the same as those for a statute.

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[15] The Second Circuit adopted the district court's analysis, affirming the refusal to find a private right of action under the Federal Aviation Administration's drug-testing regulations. *Drake*, 147 F.3d at 170. The Second Circuit noted "that Drake could have sought redress of the alleged regulatory violations through administrative avenues, such as by filing a complaint with the Secretary of Transportation." *Id.* at 171.

The courts of appeals have all developed their tests either by analogizing to *Cort* or, as in the Fifth Circuit, by simply applying *Cort* without regard to any inherent distinctions between the lawmaking and rulemaking functions. However, despite all having started with *Cort*, they have diverged in a material way. The Third, Fifth and Ninth Circuits seem to give no weight whatsoever to the existence of administrative avenues for resolving a complaint.

For example, in this case, the Third Circuit's opinion does not mention the existence of an administrative process, yet the statute that authorizes regulations also makes it a predicate for taking action that the "agency concerned has advised [the recipient] of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1 (Appendix D at 67a). Likewise the agency regulations applicable to this case authorize the filing of an administrative complaint against a recipient of federal funds. 34 C.F.R. § 100.7(b) (Appendix G at 73a).

By contrast, the Second Circuit's approach would give great weight to the availability of such administrative avenues.

In overlooking the availability of administrative avenues for complaint resolution, the Third, Fifth and Ninth Circuits place no value on the principle of primary jurisdiction. As this Court noted in *Atchison, Topeka & Sante Fe Railway Co.* v *Wichita Board of Trade*, 412 U.S. 800, 820-21 (1973), a transportation-rate case, "National transportation policy reflects many often-competing interests. Congress has established an administrative agency that has developed a close understanding of the

various interests and that may draw upon its experience to illuminate, for the courts, the play of those interests in a particular case." 412 U.S. at 820-21. Agencies, moreover, often must apply two or more statutes simultaneously, to achieve multiple program objectives. This is such a case, since Section 602 of Title VI, while authorizing regulations, requires that they "be consistent with achievement of the objectives of the statute authorizing the financial assistance." 42 U.S.C. § 2000d-1 (Appendix D at 66a).

Petitioners do not here suggest the proper test for finding an implied right of action in agency regulations. Petitioners do suggest that the bypassing of the administrative process that can result from it is an important issue that should be addressed by the Court.

C. The Third Circuit erred in determining that disparate-impact regulations under Title VI could support private actions.

1. The court of appeals looked to the wrong enabling statute.

The Third-Circuit panel in *Chester Residents* examined the first *Angelastro* element by employing the test set out by this Court in *Cort*, and examining Section 602 of the Civil Rights Act. The panel in this case largely ignored that analysis. Instead, it concluded that the "enabling statute" was not Section 602 but Section 601 (Appendix A at 20a). The court then pointed to this Court's authority, and its own, for the proposition that Section 601 of Title VI gives rise to a private right of action. *Id.* With that machination, the court concluded that the first step of the *Angelastro* test was met. It then

summarily noted that "[w]e are persuaded by the analyses in *Chester Residents* that the second and third prong[s] of *Angelastro* are also met." (Appendix A at 20a).

The Third Circuit's analysis looked to the wrong "enabling statute." Had it looked to the correct provision – Section 602 – and applied the *Cort* test to that provision, the court would have reached a different result. Instead, the court of appeals erroneously determined that Section 601 is the statute that enables agencies to promulgate regulations. The flaw in that reasoning is evident in the plain language of the provision. Nothing in Section 601 hints even remotely at authorizing or directing agencies to do anything at all (Appendix C at 65a). Section 602, on the other hand, explicitly mandates agency action. *See* 42 U.S.C. § 2000d-1 ("Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed . . .") (Appendix D at 66a). Section 601 does not enable agencies to do anything – Section 602 does.[16]

The Third Circuit's response to that plain language was to conflate the two provisions: "As noted above, the regulation at issue here, although promulgated by the Department of Education under section 602 of Title VI, implements section 601 of Title VI." (Appendix A at 20a).

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[16] In analyzing statutes for an implied private right of action, this Court has treated different sections of the same statute differently. *Transamerica Mortgage Advisors* v *Lewis*, 444 U.S. 11, 19 (1979) (Court found that Section 215 of the Investment Advisers Act of 1940 gave rise to private actions while Section 206 of the same act did not.).

It is inappropriate to conclude that the implied right of action in Section 601 can be imported into Section 602. This Court has held that Section 601 reaches only ***purposeful*** discrimination. *Bakke*, 438 U.S. at 287. Accordingly, any private right of action implied in Section 601 relates only to claims of intentional discrimination. The regulation at issue in this case proscribes unintentional policies that result in disparate impacts and, so, Section 601's implied private action is a poor – and inappropriate – fit.

In fact, the Third Circuit erred in this case by not applying the *Cort* analysis to Section 602. *Cort* asks (1) whether the plaintiffs are part of the class for whose "especial" benefit the statute was created; (2) whether there was any indication of congressional intent to deny or create a private remedy; (3) whether the implication of a private remedy is consistent with the underlying purpose of the statute; and (4) whether the matter is one traditionally relegated to the states. 422 U.S. at 78. The second issue, legislative intent, is to be given the greatest weight. *Touche Ross & Co.* v *Redington*, 442 U.S. 560, 575 (1979). In *Thompson* v *Thompson*, 484 U.S. 174 (1988), the Court explained that "[t]he intent of Congress remains the ultimate issue, however, and 'unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" 484 U.S. at 179 (quotation omitted).

As noted above, there is nothing in the language or structure of Section 602 that suggests that Congress intended for there to be private actions to enforce the regulations described in that section. Indeed, the only remedy described expressly in Section 602 is a termination

of a wrongdoer's federal funding by the promulgating agency (Appendix D at 66a). "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Lewis*, 444 U.S. at 19.

The legislative history of Section 602 – which the Third Circuit ignored – bolsters this conclusion. There is nothing in that history to suggest that Congress intended, or even contemplated, that private persons would file lawsuits predicated on regulations and there is much that points to the contrary. *Touche*, 442 U.S. at 571-76 (a lack of evidence of legislative intent to create a private right of action, either express or by implication, can by itself provide the answer that a private right of action should not be implied.).

2. The disparate-impact regulation is impermissibly beyond the scope of the statute.

The second inquiry in the *Angelastro* analysis prescribed by the Third Circuit is whether the regulation is within the scope of the enabling statute. As noted in Section I of this petition, the regulation is not within the scope of Section 602 (or, for that matter, of Section 601).

3. Implying a private right of action to enforce disparate-impact regulations would not be consistent with the purposes of the enabling statute.

Both the Third Circuit's *Angelastro* analysis and this Court's *Cort* analysis require consideration of whether implying a private remedy would be consistent with the

purpose of the legislative scheme. *Cort,* 422 U.S. at 78; *Angelastro,* 764 F.2d at 947.

In *Alexander* v *Choate,* this Court discussed the place of Section 602 in the legislative scheme of Title VI:

> In essence, then, we held [in *Guardians*] that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

469 U.S. at 293-94. The Department of Education regulations at issue here do not enumerate those things that would constitute improper disparate impacts. The regulations do not articulate factors that would justify mere statistical disparities. Instead, they generally prohibit "criteria or methods of administration which have the effect of subjecting individuals to discrimination" and they describe a mechanism for private persons to file complaints to initiate agency action. 34 C.F.R. §§ 100.3(a)(2) and 100.7(b). The regulatory scheme itself therefore strongly suggests that an agency should decide whether the allegations of a given administrative complaint describe a disparate impact that violates the regulation. Implying a private right of action to enforce the regulation bypasses that agency expertise.[17]

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[17] Reference to the agency in the first instance is made all the more appropriate by the fact that Title VI regulations typically include a straightforward mechanism for aggrieved parties to file complaints with the agency. As Justice Scalia recently wrote in regard to the

Moreover, Section 602 requires that no action be taken against a fund recipient "until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1. Implication of a private right of action would entirely bypass that express notice requirement.

4. Implying a private right of action to enforce Title VI disparate-impact regulations has serious federalism implications.

While not all private actions brought under Title VI regulations are against state actors, a significant number are. *See, e.g., Powell* v *Ridge*, No. 98-2096 (CA3 1999); *Sandoval* v *Hagan*, No. 98-6598 (CA11 pending). The application of federal law to the States necessarily implicates issues of federalism and the Eleventh Amendment.

Title VI itself purports to abrogate Eleventh-Amendment immunity, at least for violations of the statute. 42 U.S.C. § 2000d-7. Accepting for purposes of argument that the statute successfully abrogates sovereign immunity, the issue then becomes whether an agency rule can abrogate that immunity for conduct that would not violate

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related issue of the exhaustion doctrine, "[w]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature, and must be dismissed." *Reiter* v *Cooper*, 507 U.S. 258, 269 (1993).

the statute. The Third Circuit has implicitly answered "yes."

The Third Circuit's decision conflicts with recent authority of this Court that limits abrogation. In *Seminole Tribe of Florida* v *Florida*, 116 S.Ct. 1114 (1996), the Court held that Congress could not use its Article I power to abrogate Eleventh-Amendment immunity. Accordingly, Congress has only one remaining avenue of abrogation: the enforcement provision of the Fourteenth Amendment. *City of Boerne* v *Flores*, 117 S.Ct. 2157, 2164 (1997). The implication in this case is straightforward. Congress enacted Title VI and, later, added language expressly abrogating sovereign immunity for actions to enforce the statute. 42 U.S.C. § 2000d-7. This Court held in *Guardians* that the statute reaches only purposeful discrimination. Accordingly, the abrogation reaches only purposeful discrimination. Viewed another way, the Third Circuit implicitly conferred the power to abrogate immunity on an executive agency, because this Court has already held that Congress did not itself prohibit disparate impacts. No agency has the power to abrogate sovereign immunity. *See Seminole Tribe*, 116 S.Ct. at 1123 (describing Congress' ability to abrogate in certain circumstances); *see also*, U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce . . .").[18]

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[18] This case demonstrates the danger inherent in such "Article-II abrogation." The Department of Education promulgated regulations that prohibit disparate impacts, but the regulation includes no affirmative defenses. 34 C.F.R. § 100.3 (Appendix E at 68a).

III. THE COURT OF APPEALS' DECISION PROVIDES AN OPPORTUNITY FOR THIS COURT TO CONSIDER THE APPLICATION OF *ASARCO* V *KADISH* IN A SITUATION IN WHICH THE SOURCES OF HALF OF THE OVERALL FUNDING ARE PLAINTIFFS RATHER THAN DEFENDANTS.

To have Article-III standing: (1) the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan* v *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The Legislative Parties argued below that the plaintiffs did not have standing because it was wholly speculative either that any cognizable injury was traceable to the state funding formula or that the remedy the plaintiffs request – injunctive and declaratory relief – would redress their claimed injuries. The Third Circuit disagreed:

> The legislative defendants err in assuming that the injury in this case consists of a lack of adequate funding. Here, the plaintiffs complain that non-white school children in Pennsylvania receive less favorable treatment than their white counterparts because the state funds the school districts most of them attend at a lower level than it does the school districts most white school children attend. A court

> order directing the state to equalize funding between these school districts would redress this comparative injury, even if other sources of the school district's income were simultaneously reduced. We therefore conclude that the school children's injury is redressable by court order.

(Appendix A at 30a). In so holding, the court of appeals confused the cause of action with the alleged injury, while simultaneously misconstruing both the allegations of the complaint and, more important, this Court's jurisprudence.

The plaintiffs allege that the School District has less money per student from all federal, state and local sources than some (but not all) other districts in the Commonwealth. They also allege that, among a subset of school districts in the Commonwealth that have comparable levels of student poverty, those with large minority student bodies receive less per student from the Commonwealth than those with a higher proportion of white students. As noted above, the Commonwealth provides only half of the funds used to operate the School District; most of the remainder comes from local taxes authorized by the City of Philadelphia. In their complaint, quoted by the court of appeals, the plaintiffs allege the injuries that follow from this funding situation:

> The foreseeable result [of the funding policies] has been serious impairment of the educational opportunities of the students in the School District, including the Student Plaintiffs. Lack of sufficient resources in the School District results, inter alia, in larger class sizes and higher pupil-to-teacher ratios than in surrounding school districts; reduced curricula; cuts in and elimination of programs and

> electives and advanced placement courses; shortages of textbooks; and use of outdated textbooks; shortages of equipment, supplies and technology; spartan physical education and extracurricular programs; lack of librarians and library services; insufficient numbers of counselors and psychologists; and many inadequate and crumbling physical facilities.

(Appendix A at 10a-11a). Because the alleged injury is a shortage of educational resources, but the substantial local portion of the total funding can float to whatever level the local officials see fit, the injury is not fairly traceable to the level of the state subsidy. The alleged injury is no more traceable to the state subsidy than it is to deficient funding provided by the federal government, which should also, under the Third Circuit's logic, have foreseen the impact of its funding determinations regarding Philadelphia.

The injury is also not redressable, again because local officials can offset any increase in state funding with a decrease in local funding. Indeed, one cannot even say that any court order equalizing the state subsidy to school districts on a per student basis would result in a funding increase to Philadelphia. To the extent that Philadelphia already receives an above-average subsidy, such an order would result in a net loss.

Distinguishing the cause of action from the injury leads to the conclusion that that any relief directed at the cause of action would not redress the injury. It leads to the ultimate conclusion that the plaintiffs lack Article III standing under this Court's decision in *Asarco, Inc.* v *Kadish*, 490 U.S. 605 (1989).

> Yet even if invalidation of the state law would create increased revenue for the school trust funds in the near future, an issue much disputed here, the allegations of economic harm rest on the same hypothetical assumptions as do the taxpayer claims. If respondents prevailed and increased revenues from state leases were available, maybe taxes would be reduced, or maybe the State would reduce support from other sources so that the money available for schools would be unchanged. ... These policy decisions might be made in different ways by the governing officials, depending on their perceptions of wise state fiscal policy and myriad other circumstances. *Whether the association's claims of economic injury would be redressed by a favorable decision in this case depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.*

490 U.S. at 614-15 (emphasis added). Just as the plaintiffs in *Asarco* were without standing because it was largely speculative that invalidation of the state statute would redress the asserted injury, so too are the plaintiffs in this case without standing. It is entirely speculative that the City – source of half of the funding for the School District – would maintain its current level of funding. Indeed, in its capacity as a plaintiff, the City has described its injury as including a high local tax rate. It is, therefore, likely that the City's response to an increase in state funding would be to commensurately decrease local funding to alleviate its alleged injury. The result, of course, would be that the School District's overall funding would change not at all. Moreover, the remedial effect of an increase in state

funding would also rest on the discretionary decisions of the School District about how to use its money.

Unlike the situation in *Asarco*, two of the most important actors on the funding issue are parties to this litigation. However, these two actors with discretionary control of funding are plaintiffs rather than defendants: the City of Philadelphia and the School District. A disparate-impact claim has not been asserted against them and, on the facts pleaded, could not be asserted. Therefore this case presents the Court with an opportunity to determine whether the holding of *Asarco* applies with equal vigor to a situation in which the independent actors with "unfettered discretion" are, in fact, before the court, but as plaintiffs rather than as defendants.

The Court has accepted review in other cases that seek to build incrementally on previous standing decisions. *See Friends of the Earth* v *Laidlaw Environmental Services, Inc.*, No. 98-0822, and *Steel Co.* v *Citizens for Better Environment*, 118 S.Ct. 1003 (1998). In addition, although the Court has recently considered a number of cases involving standing in a regulatory setting, *see, e.g., Steel Co.*, there is a paucity of standing cases arising from spending-power statutes in programs that do not involve personal entitlements, although this area of federal activity is an increasingly important font of federal litigation.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

DICK THORNBURGH
JOHN P. KRILL, JR. *(counsel of record)*
LINDA J. SHOREY
DAVID R. FINE
Counsel for Petitioners

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